TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 94

WM. G. LEWIS, TRUSTEE, PETITIONER,

vs.

MANUFACTURERS NATIONAL BANK
OF DETROIT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1960
CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 94

WM. G. LEWIS, TRUSTEE, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 19, 1960

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[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,019

WM. G. LEWIS, Trustee in Bankruptcy, Appellant,

—vs.—

MANUFACTURERS NATIONAL BANK, a National Banking Corporation, Appellee.

In the Matter of:

TUDOR R. ALIKASOVICH, d/b/a MIAMI CLEANERS & TAILORS, Bankrupt.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Appendix for Appellant—Filed September 26, 1959

STUART E. HERTZBERG
HERBERT N. WEINGARTEN
Attorneys for Appellant
1318 Buhl Building
Detroit 26, Michigan
WOodward 1-5505

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Stipulation of Facts on Petition for Review Filed by Manufacturers National Bank of Detroit—May 21, 1959

Bodman, Longley, Bogle, Armstrong & Dahling, attorneys for Petitioner, Manufacturers National Bank of Detroit, a national banking association, and Stuart E. Hertzberg, attorney for Wm. G. Lewis, Trustee and former Receiver of the Bankrupt, agree and stipulate to the following facts as the record on the Petition for Review:

Petitioner is the holder of a note secured by a chattel mortgage properly executed and delivered by the Bankrupt under date of November 4, 1957, covering a 1953 Pontiac automobile bearing serial number P8XH-47-321. The Bankrupt gave the note and chattel mortgage in exchange for a loan from the Petitioner made through its Grand River-Dundee branch office. After making a credit investigation of the Bankrupt, the proceeds of the loan were disbursed on November 5, 1957. On that date, the branch office forwarded the note and chattel mortgage to Petitioner's downtown Michigan-Griswold office where on November 6 and 7, 1957, it was reviewed for proper figures, interest rate, and signature, etc. and processed for credit life insurance on the Bankrupt, machine accounting records and filing. The chattel mortgage was then filed with the Wayne County Register of Deeds at 10:21 a.m. on November 8, 1957. Wayne County was the proper county for filing said mortgage. A copy of the note and mortgage is attached hereto as Exhibit 1 and made a part hereof.

There is now due and owing on the note and chattel mortgage a principal balance of $365.00 and interest at the rate of 7% per annum from and after November 15, 1958. No evidence was introduced as to the existence of a creditor of the Bankrupt who became such between the time of the execution and delivery of the chattel mortgage and the time of the filing of the chattel mortgage. On June 13, 1958, the

Honorable Harry G. Hackett, Referee in Bankruptcy, entered an Order declaring the chattel mortgage invalid and void as against the Receiver of the Bankrupt under Section 70c of the Bankruptcy Act. The Order extended the period for filing a Petition for Review for six (6) months from the date thereof, and an Order entered December 12, 1958, further extended such time until March 12, 1959. The Petition for Review was filed December 30, 1958.

[fol. 3]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER DECLARING MANUFACTURERS' NATIONAL BANK'S LIEN INVALID—Filed June 17, 1959

I, Harry G. Hackett, one of the Referees of this Court, do hereby certify that in the course of proceedings in said Cause before me, upon hearing of the Order to Show Cause issued on April 25, 1958, pursuant to petition of Wm. G. Lewis, Receiver, and the Answer thereto of Respondent, Manufacturers' National Bank, filed May 6, 1958, the following questions were presented.

Questions for Review

Did Respondent's failure to record its chattel mortgage from November 4, 1958 to November 8, 1958, render the same void as against the Receiver?

Does Section 70c, of the Bankruptcy Act, dispense with the necessity of proving that a creditor actually extended credit to the bankrupt while Respondent's mortgage was off record?

Does Section 70c, of the Bankruptcy Act, clothe the Trustee with the rights of a creditor who could have, under State Law, extended credit even though no such creditor exists?

Findings of Fact

1. No testimony was taken and no controversy exists as to the facts, and based upon stipulation the facts are as follows:

   On November 4, 1957, the Bankrupt executed and delivered a note and chattel mortgage covering a 1953 Pontiac automobile, owned by him, to the Respondent, Manufacturer's National Bank. Disbursement was made thereon on November 5, 1957 but the mortgage was not recorded until November 8, 1957, or four (4) days after its execution.

   The Receiver contended that failure to record the chattel mortgage immediately rendered the same void as against him.

Your Referee, upon reading Section 70c, of the Bankruptcy Act, which provides that:

> "The Trustee, as to all property, of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings whether or not such a creditor exists";

made the following conclusions of law.

[fol. 4] *Conclusions of Law*

Michigan Statutes Annotated, 26.929, as amended by Public Act 233, September 27, 1957, provides that:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mort-

gagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. * * * Provided, however, That no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. * * * "

As stated before, Section 70c clothes the Trustee with the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor exists. Thus, we are remitted to the law of this State to determine if a creditor could have obtained a lien upon the automobile involved at the time the bankrupt filed his petition. Your Referee held that since M. S. A., 26.929 allows fourteen (14) days in which to record purchase money mortgages without mentioning any specific period of time within which to file non-purchase money mortgages, that the latter must be filed immediately. Indeed, the Court of Appeals for the Sixth Circuit, in the case of General Motors Acceptance Corporation v. Collier, 106 F. 2d 584, decided before the statute was amended following fourteen (14) days for recording of purchase money mortgages, held that recording must be immediate.

Under Michigan law any creditor who extends credit to a mortgagor while an outstanding mortgage against his property is off record becomes vested with rights superior to those of the mortgagee, which cannot be defeated by subsequent filing of the mortgage or by the mortgagee subsequent taking possession. See Ransom and Randolph Company v. Moore, 272 Michigan 31; Fearey v. Cummings, 41 Michigan 376; O'Neil against Brooks, 180 Michigan 540. See also, In Re Plymouth Glass Company; United States District Court, Eastern District of Michigan, Southern Division, No. 38063.

Your Referee held that since the mortgage involved herein [fol. 5] was off record for four (4) days, a creditor could have extended credit during that period thereby becoming

vested with rights, under Michigan law, not subject to be defeated by subsequent filing of the mortgage by the mortgagee. And, since the Trustee is vested with those rights, under Section 70c, the mortgage was void as to him.

The following documents are attached to the Certificate to facilitate review by the Honorable Judge.

1. Petition of Receiver for Order to Show Cause, and Order entered thereon directed to Manufacturers National Bank and others, filed April 25, 1958.
2. Response of Manufacturers' National Bank to Order to Show Cause, filed May 6, 1958.
3. Order re: validity of chattel mortgage entered by your Referee on June 13, 1958.
4. Stipulation of Facts on Petition for Review filed May 26, 1959.

The original of the Petition for Review is on file in the Office of the Clerk of the United States District Court, and therefore, no copy thereof is attached.

/s/ Harry G. Hackett
Referee in Bankruptcy

[fol. 6]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OPINION—July 27, 1959

Statement of Facts

Mortgagee petitions review of Bankruptcy Referee's order holding chattel mortgage void. The facts are these:

On November 4, 1957, bankrupt executed and delivered to respondent, Manufacturer's National Bank, a note and chattel mortgage covering a 1953 Pontiac automobile owned by him. Disbursement was made thereon November 5, 1957, but the mortgage was not recorded until November 8, 1957,

or four days after its execution. The bankrupt filed his petition April 18, 1958. The receiver contended inter alia that failure to record the chattel mortgage immediately rendered the same void as against him. Referee's determination of invalidity was founded on two conclusions:

1—That M.S.A. 26.929 "allows" 14 days within which to record purchase money mortgages, but fails to mention a permissive time in other cases, hence non-purchase-money mortgages are void unless filed "immediately".

2—That under Michigan law a creditor could have intervened the time the mortgage was off-record, that his rights would not be defeated by subsequent recording, and that under Sec. 70(c) the trustee stands in his stead whether or not such creditor exists.

Conclusions of Law

First: This is admittedly not a purchase money mortgage.

Second: The Michigan Statute reads—

M.S.A. Sec. 26.929

"Every mortgage . . . of goods and chattels . . . which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession . . . *shall be absolutely void* as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, *unless* the mortgage or a true copy thereof *shall be filed* in the office of the register of deeds . . . Provided, however, *That no purchase money mortgage shall be void as against the creditors* of the mortgagor *if* filed within 14 days from the date of the execution of such mortgage." (Emphasis ours.)

Similarly Sec. 26.922 provides conditions under which agreements shall be void unless they be in writing. But, as this language does not operate to void written contracts because they previously were oral, it does not void recorded documents because they previously were unrecorded.

[fol. 7] The courts have held that—

> "... the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage." Detroit Trust Co. v. Pontiac Savings Bank, 196 F. 29, p. 33.

See also Peter Schuttler Co. v. Gunther, 222 Mich. 430, 192 N.W. 661; Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 247 N.W. 76, and cases cited therein. General Motors Acceptance Corporation v. Coller, 106 F. 2d 584, relied on by the referee, conforms to this result.

Since no creditors, mortgagees or purchasers intervened November 4 and 8, 1957, and since no prior creditors perfected liens during that time, the mortgage was not void under state law.

The chief question is what rights are acquired by the trustee under Section 70(c). Had creditors intervened, they could have voided the mortgage as discussed above, and the trustee would be placed in their position to effectuate this object. Deane v. Fidelity Corporation of Michigan, 82 F. Supp. 710; In Re Cotter, 113 F. Supp. 859. Also, if the lien were unrecorded as of the date of filing petition in bankruptcy, the mortgage would be voided. In re Urban, 136 F. 296. To otherwise void the mortgage under the Michigan Statutes, the trustee must either be placed in the status of a non-existing intervening creditor, or the status of a creditor at the time the mortgage was off-record. Bankruptcy Act Section 70(c) puts him in neither position. It provides:

> "The trustee, as to all property, (of the bankrupt at the date of bankruptcy) whether or not coming into possession or control of the court, upon which a *creditor of the bankrupt could have obtained a lien* by legal or equitable proceedings *at the date of bankruptcy*, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by . . . such proceedings, whether or not such a creditor exists." (Emphasis ours.)

Patently the position of a creditor with a right to perfect a lien while the mortgage was off-record is precluded because the trustee indisputably is vested as of the *date of bankruptcy,* with rights to property upon which a creditor could have obtained a lien *at that date* only.

Trustee argues that he is placed in the position of an intervening creditor, whether or not such exists, and who has perfected a lien, whether he has done so or not. Let [fol. 8] us follow the history of this section. The former, 1950, amendment read:

> "... The trustee, as to *all* property ... shall be deemed vested as of the date of bankruptcy with all the rights, ... of a creditor then holding a lien thereon ... whether or not such a creditor actually exists." (Emphasis ours.)

Particularly with the understanding of the former impediment that confronted trustees, (See Security Warehousing Co. v. Hand, 206 U.S. 415) we fail to see how this can be read as doing more than vesting trustee with lien rights whether or not there exists a creditor—"then holding a lien." It does not put him in that position "whether or not a creditor could obtain a lien."

But the 1952 amendment removes all doubt, vesting him with rights to property only—

> "upon which a creditor of the bankrupt could have obtained a lien ... "

And to reach the contended construction we would have to read this qualification entirely out of the section, for to say trustee is vested as to property—

> "upon which a creditor of the bankrupt could have obtained a lien, whether he could obtain a lien or not"

is contradictory and renders the qualification impotent. The legislative intent appears to have been to leave property to which trustee is vested with title under Section 70(a) subject to attack under Section 70(e), wherein the test of voidability is voidability under the appropriate State or

Federal law; and to apply Section 70(c) solely to property not covered thereby. House Report No. 2320 on S. 2234, 82nd Congress, 2nd Sess. (1952) 2, explains the amendment—

> "... trustee already has title to all the bankrupt's property, and *it is not proper to say that he has rights of a lien creditor upon his own property.* What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner." (Emphasis ours.)

Constance v. Harvey, 215 F. 2d 571 (CA-2), followed in Conti v. Volper, 229 F. 2d 317 (also reported as In Re Gondola Associates, 132 F. Supp. 205) is the strongest case cited and is urged as the primary authority for substantiating trustee's position. There the mortgage was unrecorded almost a year and was found not to be recorded "within a reasonable time" as required by New York law. [fol. 9] Originally the Circuit Court remanded the case to determine whether the mortgage was recorded prior to the filing of bankruptcy petition and prior to intervention of creditors. A month later, sua sponte, the court reversed its result with the following language:

> "*Since an existing creditor* ... could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under Sec. 70, sub. c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor ... we think his position must prevail ..."

It is not clear whether the court meant, as a finding of fact, that under New York law a creditor did exist who could have obtained a lien, and since he existed, the trustee was in his shoes; or whether the court meant, as a matter of law, that since such a creditor could exist, the trustee was in his shoes. In Conti v. Volper, supra, it was interpreted as making the legal, not factual, conclusion and applied to a situation where no creditors did exist.

See also In Re Billings, 170 F. Supp. 253 for a like construction. If the Constance case is based upon an interpre-

tation of New York law, which we believe it is, it is entirely inapplicable here, the question of whether the mortgage is filed within a "reasonable time" being immaterial under the Michigan Statute. See In Re Varratos, 159 F. Supp. 730, (D.C. N.Y.) affirmed 259 F. 2d 920 (CA-2), and In Re American Textile Printers Co., 152 F. Supp. 901.

At best the Constance case is the ambiguous statement of another Circuit which we are constrained not to follow in view of the present clear wording of the Act itself to the contrary effect, the legislative intent as expressed in the House Report, supra, and to the utter lack of evidence of legislative intent to create the broad inequities that would commonly follow its application.

This court is aware that Bankruptcy Act Section 70(c) has been of great help in the past, under a rather strict interpretation, in achieving equity and justice in bankruptcy cases. However, a close analysis of those cases will reveal that it has usually not been utilized except where the possibility or probability of fraud was present.

Furthermore, if such a strict interpretation is followed, as made by the Bankruptcy Court, it will mean the end of a very salient and important feature of our economics—[fol. 10] banking and otherwise. Four days is certainly not an unreasonable time to pass between the giving of a mortgage and its recording and surely no court can take that position. In Brown, Trustee v. Atlantic Bank of New York, 259 F. 2d 920, the mortgage filed seven days after being given was not unreasonable unless so found by the court. If this is important, we hold to the contrary. Here we find four days not unreasonable. And, if so, where is the limit and what about the duty of the loaner who is handling other people's money to check up on investments made with that money? Here a long time elapsed between the giving of the mortgage and the day bankrupt's petition was filed. But only four days between the giving and filing of the mortgage. Congress never intended an interpretation that would handicap business and certainly not one which would seek to give an advantage to creditors such as would happen here if the trustee were to be in the position at all times of a hypothetical creditor who does not and never did exist. Would not this be "unjust enrichment" for the other

creditors? We doubt very much that any interpretation such as advocated by the trustee can meet the test of constitutionality that might be suggested here, as long as it is legal to take a mortgage for money loaned. This is legal in Michigan. In fact we don't know of any place in the world where it isn't legal. Being legal we should not give a strained interpretation of the Bankruptcy Act to deprive the loaner not only of the fruits of his loan but of the very loan itself.

For these reasons we hold that the mortgage herein is valid and this matter is hereby remanded to the Referee for further proceedings in conformity herewith. An order to that effect should be presented for the court's signature.

Frank A. Picard
United States District Judge

Dated: July 27, 1959

[fol. 11]

In United States District Court
For the Eastern District of Michigan

Southern Division

Order Allowing Petition for Review by Manufacturers National Bank of Detroit and Reversing Referee's Order—August 13, 1959

On December 30, 1958, Manufacturers National Bank of Detroit, a national banking association, filed a Petition for Review of an Order entered June 13, 1958, by the Honorable Harry G. Hackett, Referee in Bankruptcy, declaring a chattel mortgage of the Petitioner invalid and void as against the Receiver of the Bankrupt under Section 70(c) of the Bankruptcy Act.

The Petitioner and Trustee have submitted this matter to the Court on briefs, waiving oral argument and the Court, after due consideration and being fully advised in the premises, announced its decision by Opinion dated July 27, 1959. In conformity with such Opinion,

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It Is Hereby Ordered, Adjudged and Decreed that Petitioner's chattel mortgage dated November 4, 1957 is valid

under Michigan law and cannot be avoided by the Receiver or Trustee of the bankrupt proceeding under Section 70(c) of the Bankruptcy Act.

It Is Further Ordered, Adjudged and Decreed that the Order entered July 13, 1958 by the Honorable Harry G. Hackett be and is hereby reversed and this matter be and hereby is remanded to said Referee for further proceedings in accordance with this Order and the Opinion of this Court dated July 27, 1959.

Frank A. Picard
District Judge

Dated: August 13, 1959.

[fol. 12] Minute Entry of Argument and Submission—February 4, 1960 (omitted in printing).

[fol. 13] [File endorsement omitted]

In United States Court of Appeals
For the Sixth Circuit

No. 14,019

In the Matter of:

Todor R. Alikasovich, d/b/a Miami Cleaners & Tailors, Bankrupt,

Wm. G. Lewis, Trustee in Bankruptcy, Appellant,

vs.

Manufacturers National Bank of Detroit, a National Banking Association, Appellee.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Opinion—Decided March 7, 1960

Before: Cecil, Pope and Weick, Circuit Judges.

Weick, Circuit Judge. This case involves the validity of a chattel mortgage on an automobile as against the claims of the trustee in bankruptcy of the mortgagor.

Prior to bankruptcy, the bankrupt had borrowed money from Manufacturers National Bank of Detroit, Michigan. To evidence the loan and secure its payment on November 4, 1957 he executed and delivered to the bank a promissory note and chattel mortgage on his 1953 Pontiac automobile. The proceeds of the loan were disbursed on the following day. The papers were then forwarded from the bank's branch office, where the loan had been made, to its downtown office for processing and recording of the mortgage. The chattel mortgage was filed by the bank with the [fol. 14] Wayne County Register of Deeds on November 8, 1957.

About five months later, namely, April 18, 1958 the borrower filed a voluntary petition in bankruptcy in the District Court upon which an adjudication in Bankruptcy was duly entered.

The referee in bankruptcy held that the mortgage was void as against the trustee in bankruptcy. The District Judge reversed the order of the referee and the trustee in bankruptcy has appealed to this Court.

The pertinent provision of Michigan Statutes Annotated, 26.929, as amended by Public Act 233, September 27, 1957 relating to the recording of chattel mortgages is as follows:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. . . . Provided, however, that no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. . . ."

The last proviso in the statute is the amendment of September 27, 1957. Obviously, it has no application to the

present case since the chattel mortgage was not a purchase money mortgage.

The Michigan statute has been construed to require the chattel mortgage to be filed immediately with the Register of Deeds. *General Motors Acceptance Corp.* v. *Coller*, 106 F. 2d 584 (C. A. 6, 1939). Unless so filed, the chattel mortgage is void as against creditors who extended credit in the interim between the date of the instrument and its filing for record. *Trailmobile, Inc.* v. *Wiseman, Trustee*, 244 F. 2d 76 (C. A. 6, 1957); *Klingensmith* v. *James B. Clow & Sons*, 270 Mich. 460 (1935); *Ransom & Randolph Co.* v. *Moore*, 272 Mich. 31 (1935); *Burroughs Adding Machine Co.* v. [fol. 15] *Wieselberg*, 230 Mich. 15 (1925); *O'Neil* v. *Brooks*, 180 Mich. 540 (1914); *Fearey* v. *Cummings*, 41 Mich. 376 (1879); Cf. *Moore* v. *Bay*, 284 U. S. 4 (1931).

There was no evidence that any creditor had extended credit to the bankrupt between the date of the mortgage and its recording four days later. Since no creditors had intervened in the present case, the chattel mortgage of the bank was valid and unassailable under Michigan law. If any imperfection had existed in the mortgage it had become perfected long before bankruptcy.

The trustee in bankruptcy contends that although unassailable under state law, the chattel mortgage was void by reason of the provisions of Section 70 subsection (c) of the Bankruptcy Act[1] which gave to the trustee the status of a perfect hypothetical creditor and, therefore, the case must be considered as if a creditor did exist in the interim period.

The trustee relies on *Constance* v. *Harvey*, 215 F. 2d 571 (C. A. 2, 1954), cert. denied 348 U. S. 913, which involved the validity of a chattel mortgage under New York law. As judicially construed, the New York statute granted a reasonable time to file the mortgage after its execution.

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[1] "The Trustee, as to all property, whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor exists" (11 U. S. C. A. ¶ 110c).

In that case over 10 months had elapsed between the date of the mortgage and its filing for record which the court said was not within a reasonable time. No creditor, however, had intervened in the interim. The court held the mortgage void under Section 70, subsection (c) of the Bankruptcy Act.[2] The court said:

"Since an existing creditor without notice of the chattel mortgage could have obtained a lien at the time of the filing of the petition in bankruptcy, and since Section 70, subsection (c) of the Bankruptcy Act the trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—Hoffman v. Cream-O-Products, 180 F. 2d 649 (C. A. 2, 1950), cert. denied 340 U. S. 815 (1950) we think his position must prevail over that of the mortgagee-appellant."

[fol. 16] The trouble with *Constance* v. *Harvey*, in our judgment, was in the retroactive extension of the rights of the trustee in bankruptcy to include those of a creditor which did not in fact exist as of a period almost one year prior to bankruptcy. The critical time for the accrual of the trustee's rights under Section 70c is "at the date of bankruptcy" not prior thereto. The trustee can only be "vested as of such date" with the rights of a creditor "then holding a lien whether or not such a creditor actually exists." This means a creditor at that time and not prior thereto. Before *Constance* v. *Harvey*, it had always been understood that the trustee's rights under Section 70c accrued as of the date of bankruptcy and not earlier. There is nothing in the section giving to either the trustee or a creditor rights antecedent to bankruptcy.

The rights and remedies of the trustee under Section 70, subsection (e) of the Bankruptcy Act to reach fraudulent or otherwise invalid transfers or encumbrances must not be confused with his rights under Section 70, subsection (c). While Section 70, subsection (e) would permit a trustee to reach invalid transfers or encumbrances whenever they

[2] The court originally held the mortgage to be valid. On petition for rehearing, the court, sua sponte, reversed its original position and held the mortgage void under ¶ 70c.

arose, it would afford no remedy here where the lien of the chattel mortgage had been perfected and was valid against creditors long before bankruptcy.

Section 70, subsection (c) gives the trustee the status of a lien creditor as of the date of bankruptcy regardless of whether or not such a creditor existed. It does not give him or the creditor any status earlier than bankruptcy.

The trustee in bankruptcy is not an innocent purchaser for value. He takes title to the bankrupt's property subject to all liens, claims and equities existing thereon. *Zortman, Trustee* v. *First National Bank,* 216 U. S. 134 (1910); *Commercial Credit Co.* v. *Davidson,* 112 F. 2d 54 (C. A. 5. 1940); *Hoehn* v. *McIntosh,* 110 F. 2d 199 (C. A. 6, 1940); *Hertzberg, Trustee* v. *Associates Discount Corp.,* .... F. 2d .... (C. A. 6, 1959). In fact the trustee, standing in the position of a creditor, holds about the lowest form of security.

Whether or not a valid lien on the bankrupt's property existed is dependent upon the recording laws of the state. *Holt* v. *Crucible Steel Co.,* 224 U. S. 262 (1912).

As heretofore pointed out, the chattel mortgage of the bank was valid under Michigan law. No creditor could [fol. 17] have assailed it prior to bankruptcy. The mortgage was based upon a present consideration. It was filed for record within a reasonable time after its execution. The bankrupt received full value. We see no good reason in this case for extending back retroactively the "strong arm" of the trustee to a period of five months before bankruptcy and invalidating a security valid under state law. The creditors of the bankrupt's estate are entitled to no such windfall.

The confusion and criticism which followed in the wake of *Constance* v. *Harvey* are not conducive to our following the decision.[3]

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[3] 4 Collier on Bankruptcy, 14th Edition, p. 1431 fn. 30.

The National Bankruptcy Conference in 1956 approved an amendment to Section 70c to overrule the doctrine of Constance v. Harvey. Summary of Proceedings N. B. C., November 9, 10, 1956, p. 9.

In House Report 745, Committee on Judiciary H. R. 7242, August 3, 1959, it is stated: "From 1910 to 1954 it was assumed that the

District Judge Picard was right in holding that the chattel mortgage was valid under Michigan law and his judgment is affirmed.

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rights of the trustee under 70c accrue as of the date of bankruptcy and no earlier. However, in Constance v. Harvey (215 F. 2d 575 (2d Cir., 1954), cert. denied, 346 U. S. 913 (1955), it was held that under Section 70c a trustee has the rights of an ideal hypothetical creditor who has acquired his claim prior to bankruptcy. . . .

The rights of a trustee under 70e are entirely derivative and dependent upon the existence of an actual creditor against whom the transfer might have been invalidated in the absence of bankruptcy. Those rights relate back to whatever date they first arose. Section 70c, on the other hand, gives the trustee the status of a hypothetical judicial lien creditor whose rights arise as of the date of bankruptcy.

" . . . The holding in Constance v. Harvey by injecting into Section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of Constance v. Harvey. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of Constance v. Harvey presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the Act. . . ."

Two District Courts have refused to follow Constance v. Harvey.

In re American Textile Printers Co., 152 F. Supp. 901 (D. C. N. J., 1957).

In re Billings, 170 F. Supp. 253 (D. C. Mo. 1959).

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—March 7, 1960

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 19] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 20]

SUPREME COURT OF THE UNITED STATES

No. 949, October Term, 1959

WM. G. LEWIS, Trustee, Petitioner,

vs.

MANUFACTURERS NATIONAL BANK OF DETROIT.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.